IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35872

DANIEL F. MOWREY,	)	**2010 Unpublished Opinion No. 432**
	)	
Petitioner-Appellant,	)	**Filed: April 16, 2010**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Respondent.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Shoshone County. Hon. Fred Gibler, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Elizabeth Ann Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Elizabeth A. Koeckeritz, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Daniel F. Mowrey appeals from the district court's order summarily dismissing his application for post-conviction relief. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

On November 13, 2001, Mowrey pled guilty to four counts of lewd conduct with a minor under the age of sixteen, Idaho Code § 18-1508. On March 11, 2002, the district court imposed unified sentences of life, five years determinate, with each count to run consecutively. Mowrey did not directly appeal his judgment of conviction, resulting in his conviction becoming final on April 22, 2002. He did file an Idaho Criminal Rule 35 motion, which was denied. This Court affirmed the district court's denial of Mowrey's Rule 35 motion. *See State v. Mowrey*, Docket No. 34247 (Ct. App. June 10, 2008) (unpublished).

On May 8, 2008, Mowrey filed an application for post-conviction relief,[1] based "upon the 'new rule of law' resulting from the decision in *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006)." Mowrey alleged that his trial counsel and the prosecutor failed to "inform[] the Court that the information contained within the psychosexual evaluation was obtain[ed] illegally." Mowrey claimed that the district court arrived at its sentence "by use of information presented from the illegally obtain[ed] psychosexual evaluation and presentence report." Mowrey asserted that had he known his statements made during the evaluation would have been used against him at sentencing, "he would have invoked his 5th Amendment right not to incriminate himself, nor even have participated in the evaluation or presentence report." He also argued that trial counsel should have informed him that he "was waiving his Fifth Amendment right to self-incrimination" and that his Sixth Amendment right to counsel was violated when counsel was not present during the psychosexual evaluation or the presentence investigation. Mowrey requested counsel, which was granted.

The State filed an answer and, subsequently, a motion for summary dismissal and brief in support of the motion contending that Mowrey's application was untimely. A hearing was held on the State's motion, and the district court dismissed Mowrey's application for post-conviction relief, concluding that it had been untimely filed and that *Estrada*'s clarification of the law did not extend the statute of limitations. Mowrey appealed.

On November 3, 2008, Mowrey filed a motion for reconsideration of the court's order dismissing his application for post-conviction relief as well as a brief in support of his motion. Mowrey argued that *Estrada* announced a "new rule" such that the statute of limitations should be tolled. The district court denied the motion for reconsideration. The court relied upon *Vavold v. State*, 148 Idaho 44, 46, 218 P.3d 388, 390 (2009), wherein the Idaho Supreme Court stated, by way of dicta: "It is our view, therefore, that *Estrada* did not announce a new rule of law entitled to retroactive effect." The district court agreed with this analysis and denied Mowrey's motion. Mowrey did not file an appeal from the district court's order.

---

[1] Mowrey's application is titled "Successive Petition for Post Conviction Relief and Affidavit in Support." However, the record does not include any prior application.

II.

ANALYSIS

Mowrey asserts that the district court erred in summarily dismissing his application for post-conviction relief. He contends that *Estrada* announced a new rule of law and that it should be retroactively applied to him. He also argues that his case raises important due process issues such that this Court should grant equitable relief by tolling the statute of limitations.

As noted by the district court, the Supreme Court recently stated in *Vavold*, 148 Idaho at 46, 218 P.3d at 390:

> [W]e note, admittedly by way of dicta, that we agree with the district court's conclusion that *Estrada* did not announce a new rule of law. As the district court observed, we stated in *Estrada* that our earlier "*decisions clearly indicate* that both at the point of sentencing and earlier, for purposes of a psychological evaluation, a defendant's Fifth Amendment privilege against self-incrimination applies." 143 Idaho at 563, 149 P.3d at 838 (emphasis added). It is our view, therefore, that *Estrada* did not announce a new rule of law entitled to retroactive effect.

Mowrey acknowledges the Court's language, but contends that it is not controlling because it is not the holding of the case; rather, that it is dicta. Mowrey also acknowledges this Court's opinion in *Kriebel v. State*, 148 Idaho 188, 191, 219 P.3d 1204, 1207 (Ct. App. 2009), where we quoted the above language in *Vavold* and held: "Thus, given this clear direction from our Supreme Court, we conclude that Kriebel's post-conviction petition was untimely, because the post-conviction statute of limitations could not have been tolled on the basis that *Estrada* announced a new, retroactively applicable rule."[2] Mowrey notes that at the time he filed his brief with the Court on November 20, 2009, a petition to review *Kriebel* was still pending and thus the case was not final. However, the Supreme Court denied review on November 20, 2009, giving *Kriebel* precedential effect.[3] *See State v. Guzman*, 122 Idaho 981, 986-87, 842 P.2d 660, 665-66

---

[2] We note that the Supreme Court recently adopted the retroactivity test from *Teague v. Lane*, 489 U.S. 288 (1989), for criminal cases on collateral review. *See In re Rhoades, et al. v. State*, ___ Idaho ___, ___ P.3d ___ (March 17, 2010). We utilized *Teague*'s retroactivity test in *Kriebel*. Thus, we need not address Mowrey's retroactivity argument under *Linkletter v. Walker*, 381 U.S. 618 (1965).

[3] We recognize that Mowrey's appellate counsel filed a motion to suspend the briefing schedule pending final resolution of *Kriebel* as this case raises identical issues as those addressed in *Kriebel*. Mowrey's counsel asserted that once *Kriebel* was issued she could discuss the

(1992) (acknowledging that absent precedent from the Supreme Court, "new principles of law announced by the Court of Appeals become precedential").

As noted in Mowrey's motion to suspend briefing, this case raises "identical" issues to those already determined in *Kriebel*. Thus, *Kriebel* is controlling here. As such, the district court did not err in summarily dismissing Mowrey's application for post-conviction relief because it was untimely filed. "[T]he post-conviction statute of limitations could not have been tolled on the basis that *Estrada* announced a new, retroactively applicable rule."[4] *Kriebel*, 148 Idaho at 191, 219 P.3d at 1207.

III.

CONCLUSION

The district court's order summarily dismissing Mowrey's application for post-conviction relief is, therefore, affirmed. No costs or attorney fees are awarded on appeal.

Chief Judge LANSING and Judge MELANSON, **CONCUR.**

"continued viability" of the appeal with her client and, thus, conserve judicial resources. The State objected, contending that a delay would merely waste time and resources, not conserve them. The Supreme Court, finding good cause, denied the motion to suspend the briefing schedule.

[4] We note, incidentally, that since *Kriebel* was issued, this Court has twice reaffirmed its holding in unpublished opinions. *See Coburn v. State*, Docket No. 35416 (Ct. App. March 30, 2010) (unpublished); *Lightner v. State*, Docket No. 35740 (Ct. App. March 17, 2010) (unpublished).